Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1253

THE OPERATING ENGINEERS PENSION TRUST,

Petitioner,

vs.

BETTY LOU LIONBERGER,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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THE OPERATING ENGINEERS PENSION TRUST,
Petitioner,

vs.

BETTY LOU LIONBERGER,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Appeal of the State of California, Second Appellate District, which was filed on September 20, 1979.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, is reported at 97 Cal.App.3d 56, 158 Cal.Rptr. 535 (1979), and appears at Appendix A of this Petition. The minute order of the California Supreme Court appears at Appendix B.

Jurisdiction.

The opinion of the Court of Appeal of the State of California, Second Appellate District, was filed on September 20, 1979. The Supreme Court of California denied a hearing on November 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

The questions presented by this petition are:

1. Does a State court have jurisdiction of an action which, for its determination, requires the application or clarification of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA")?

2. Does ERISA preempt California community property law insofar as that State law provides a non-participant spouse an interest in an employee benefit plan?

3. Does ERISA prohibit the order of the lower court that the Petitioner, an employee benefit plan, pay pension benefits directly to the Respondent, a non-participant spouse?

4. Does ERISA prohibit the order of the lower court that bars the Petitioner from paying benefits to a participant in its Pension Plan in the form of a joint and survivor annuity?

Statutes Involved.

This case involves the following statutes, the pertinent parts of which are set forth in Appendix C: 26 U.S.C. § 401; 28 U.S.C. § 1257; 29 U.S.C. § 1002; 29 U.S.C. § 1055; 29 U.S.C. § 1056; 29 U.S.C. § 1102; 29 U.S.C. § 1103; 29 U.S.C. § 1104; 29 U.S.C. § 1109; 29 U.S.C. § 1131; 29 U.S.C. § 1132; 29 U.S.C. § 1144; 45 U.S.C. § 231d; and 45 U.S.C. § 231m.

Statement of the Case.

The Respondent ("Wife") married Robert W. Lionberger ("Husband") on December 24, 1953, and they separated on August 30, 1975 (C.T. pp. 1, 4).[1] Between October, 1963, and August 30, 1975, the Husband accumulated credits in the Pension Plan of the Operating Engineers Pension Trust ("Trust") (C.T. pp. 65, 99, 155). The Pension Plan provides its participants a choice of several forms of pension payments (C.T. pp. 86-87 and 103-107). The provisions of the Plan, however, allow pension payments to be made only to a participant in the Plan or, if he dies, to his surviving spouse, his designated beneficiary, or his heirs or estate, depending on the circumstances (C.T. pp. 86-87 and 103-107).

The Wife initiated a proceeding to dissolve her marriage and on April 5, 1976, filed a Petition to join the Trust as a party to the proceeding (C.T. pp. 1, 4, 24-30). The Petition prayed that the Trust be ordered to pay directly to the Wife a portion of the alleged community interest in benefits held by the Trust and also prayed that the Trust be ordered not to honor any election of benefits by the Husband that would lessen the Wife's interest (C.T. p. 32). The Trust filed an answer alleging as an affirmative defense that ERISA would preclude the orders prayed for by the Wife (C.T. pp. 38-39).

At the trial, the Trust submitted a brief and argued that ERISA preempted California community property law. The court ordered an Interlocutory Judgment of Dissolution of Marriage (Appendix D) which was entered on April 14, 1978 (C.T. pp. 151-152). The

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[1] "C.T." refers to the Clerk's Transcript of the Superior Court proceedings conducted below.

court found that the Husband had accumulated credits in the Trust and declared that the credits were the community property of the Husband and Wife. The court ordered the Trust to pay directly to the Wife part of the pension payments payable to the Husband. The court ordered the Trust not to honor any election by the Husband which would diminish the Wife's share of the pension benefits or prolong the term of their payment and the court directed the Trust not to pay benefits to the Husband in the form of a joint annuity for him and his surviving spouse (C.T. pp. 155-157). The Trust appealed (C.T. p. 168). The matter was briefed and the Trustees raised the issues which are now presented in this writ.

On September 20, 1979, the Court of Appeal, Second Appellate District, filed its opinion in this matter. Except for a modification which is not relevant here, the Court of Appeal affirmed the judgment.

The appellate court rejected the Trust's contention that federal courts have exclusive jurisdiction in actions involving the application or clarification of the provisions of ERISA. The court stated:

> "The State of California has exclusive jurisdiction over domestic relations actions brought by California residents to determine their rights in California property. (In re Burrus (1890) 136 U.S. 586, 593.) In addition, the state has concurrent jurisdiction with the federal courts to the extent that one of the assets of the domestic relations action is a pension or retirement plan governed

> by ERISA. (Stone v. Stone, supra, 450 F.Supp. at pp. 921-923; 29 U.S. Code Anno., § 1132(e)(1).)"

The appellate court also declined to reconsider its previous rulings concerning ERISA preemption of California community property law, stating that:

> "Issues 2, 3, and 4 concerning federal pre-emption of California community property law are identical to the issues raised and resolved in this court's recent opinion in In re Marriage of Johnston (1978) 85 Cal.App.3d 900. Appellant acknowledges that in that opinion this court concluded that the division of pension benefits and their distribution by the trust directly to the non-employee spouse were not in violation of ERISA and that ERISA does not pre-empt California's community property law. However, the trust contends that those holdings are in error and requests that they be reexamined. Having done so, we are convinced that ERISA contains no evidence of congressional intent to pre-empt state marital property laws."

Finally, the appellate court concluded that the trial court had the authority to prohibit the Trust from paying benefits in the form of a joint and survivor annuity despite the mandate of ERISA. The court stated:

> "We see no infirmity in the court's order in this case. Further, contrary to the contention of the Trust, the order does not appear to violate the provisions of ERISA."

REASONS FOR GRANTING THIS WRIT.

1. The Orders of the Lower Court Are Directly Contrary to the Provisions of ERISA and Leave the Trustees to Choose Between Disobeying the Court's Orders or Violating ERISA.

California courts have not hesitated to issue orders which require an employee benefit plan governed by ERISA to pay benefits, contrary to the clear requirement of ERISA, directly to a non-employee spouse. [*Johns v. Retirement Fund Trust, etc.* (1978) 85 Cal. App.3d 511, 149 Cal.Rptr. 551; *In re Marriage of Johnston* (1978) 85 Cal.App.3d 900, 149 Cal.Rptr. 798; *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362; *Pilatti v. Trustees of the Operating Engineers Pension Trust* (1979) 96 Cal.App. 3d 63, 157 Cal.Rptr. 594.] But in this case the lower court has taken an even bolder step. Here the lower court has barred the Trust from paying pension benefits to the Husband in the form of a joint and survivor annuity.

ERISA requires that a pension plan which provides for the payment of benefits in the form of an annuity must provide a joint and survivor annuity for the plan participants. [29 U.S.C. § 1055.] This option provides an actuarially reduced annuity for the participant during his life in order to provide an annuity for the participant's surviving spouse for her life. The Husband and Wife pension offered by the Operating Engineers Pension Plan satisfies this requirement of ERISA (C.T. pp. 103-107).

The trial court's order preventing the Trust from honoring an election by the Husband to receive this form of pension and barring the Trust from paying benefits in this form is directly contrary to the expressed

intent of ERISA and is an improper intrusion into the administration of the Trust. The preemption section of ERISA [29 U.S.C. § 1144] was drafted to prevent this very type of intrusion. An employee benefit plan must be able to rely upon one source of law to govern its conduct. If State legislation and the decrees of state trial courts are permitted to require actions and results contrary to ERISA, then the federal legislation will be frustrated and the proper functioning of the Pension Plan seriously inhibited.

The lower court's opinion subordinates the rights and interests of the plan participant to those of the former spouse to such a degree that the participant is deprived even of the right to provide the form of benefits to his surviving spouse mandated by Congress. Regardless of the wisdom of such policy as State law, the Congress has already adopted the policy to be applied nationally. The lower court's opinion has not merely protected an area of important State interest, but indeed has flaunted an unwillingness to abide by federal law to the extent of fashioning an order directly contravening federal requirements.

Other provisions of ERISA are not adequately reconciled with the lower court's orders. ERISA requires that an employee benefit plan be established and maintained pursuant to an instrument in writing. [29 U.S.C. § 1102(a)(1).] The written instrument must specify the basis on which payments are made to and from the plan. [29 U.S.C. § 1102(b)(4).] The provisions of the Operating Engineers Pension Plan do precisely that, and those provisions do not permit payments from the plan to be made to one who claims entitlement merely as the former spouse of a participant.

ERISA also declares that the Trustees of an employee benefit plan shall have exclusive authority and discretion to manage and control the assets of the plan. [29 U.S.C. § 1103(a).] Furthermore, ERISA specifically requires that the assets of the plan ". . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan" [29 U.S.C. § 1103(c)(1)], and the Internal Revenue Code conditions the tax exempt status of the Trust on compliance with this mandate. [26 U.S.C. § 401(a)(2).] The former spouse of a plan participant, following a decree of marital dissolution, is neither a participant in the plan nor a beneficiary unless specifically so designated by the participant. [29 U.S.C. § 1002(7); 29 U.S.C. § 1002(8).] The importance in the congressional plan of insuring that assets are held only for the benefit of participants and beneficiaries is emphasized in the provision of ERISA concerning fiduciary duties, which requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." [29 U.S.C. § 1104(a)(1).] The breach of this fiduciary duty subjects the Trustees of the plan to the possibility of civil or, in the case of a willful violation, even criminal liability. [29 U.S.C. §§ 1109, 1131.]

An order for direct payments from the plan to the Wife also directly conflicts with Section 206 of ERISA [29 U.S.C. § 1056(1)], which states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The tax exempt status of the trust is conditioned on the inclusion of

a provision in the pension plan prohibiting assignment or alienation of benefits. [26 U.S.C. § 401(a)(13).] The regulations under § 401(a)(13) of the Code define assignment and alienation broadly to include "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary."

2. A Determination of the Issue of ERISA Preemption of California Community Property Law Insofar as It Relates to Employee Pension Plans Would Provide Urgently Needed Guidance for All Employee Benefit Plans.

The lower court's order for direct payment to the Wife places burdens on the Trust for which all the participants and beneficiaries of the trust will be forced to pay. One case multiplied by hundreds will significantly affect the administration of trust benefit payments. California community property laws cannot be applied to the Pension Plan in this case without exposing the Pension Plan and every other pension plan to the expenses, complexities and delays of complying with the marital laws of every state. Additional records, more administrative personnel and rising legal costs will surely result, for pension plans will be drawn into myriad disputes in this age of multiple marriages, "common law" mariages and non-marriages, and high mobility among the states. The greatest cost, however, may prove to be in time, as pension payments are delayed by conflicting claims among classes of judicially created beneficiaries of community property laws.

Delay in the payment of benefits, frustrates a primary goal of ERISA to enhance *prompt* payment of pension benefits through uniform, central regulation. The doctrine of preemption was conceived specifically to preclude such a frustration of congressional purpose. [*Amalgamated Association, etc. v. Lockridge,* 403 U.S. 274, 285-286, 91 S.Ct. 1909, 1917 (1971).] California community property law cannot be allowed to nullify the congressional plan. *Perez v. Campbell,* 402 U.S. 637, 652, 91 S.Ct. 704, 712 (1971).

ERISA clearly satisfies all judicial requirements necessary to justify an inference of federal preemption even in the absence of an express preemption clause in the statute. Yet, in addition, ERISA contains an express preemption clause with an intentionally broad and sweeping scope.

> "(a) Except as provided in subsection (b) of this section the provisions of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975." 29 U.S.C. § 1144.

The unequivocal language compels a finding that ERISA preempts the application of California community property law in the circumstances presented in this case. [Kilberg and Heron, *The Preemption of State Law Under ERISA,* 1979 Duke L. J., 383, 418 (1979).]

3. The Decision of the Lower Court in This Case Conflicts in Principle With Other Decisions of This Court.

On January 22, 1979, this Court rendered its decision in the case of *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802 (1979). There, the petitioner husband had initiated a proceeding to terminate his marriage. He was a railroad machinist who was entitled, under the Railroad Retirement Act of 1974 ("Act") [45 U.S.C. § 231 *et seq.*], to receive retirement benefits if and when he attained age 60. The respondent wife requested an order granting a portion of those benefits as community property.

The trial court denied her request and the appellate court affirmed, relying on § 231m of the Act, which provides that:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subejct to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

The California Supreme Court reversed, reasoning that the wife was not a creditor but a present owner. This Court granted certiorari to consider whether the award to the wife impermissibly conflicted with the Act.

This Court reversed and remanded citing *Wissner v. Wissner,* 338 U.S. 655, 70 S.Ct. 398 (1950); *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089 (1962), and other cases. This Court stated:

"Here, California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require. The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation."

The *Hisquierdo* decision provides convincing support by analogy for the view that the unambiguous language of ERISA must be given the effect which Congress intended, *i.e.*, the preemption of all state laws relating to employee benefit plans.

4. California State Courts Lacked the Jurisdiction to Determine This Case Because Federal Courts Have Exclusive Jurisdiction Over All Suits Involving the Application or Clarification of the Provisions of ERISA.

Section 502(e)(1) of ERISA [29 U.S.C. § 1132(e)(1)] states:

"Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The sole exception to exclusive federal jurisdiction over suits by or against employee benefit plans [29 U.S.C. § 1132(a)(1)(B)], is for suits brought to enforce or clarify rights *under the terms of the plan*. The Wife's claim that she is entitled to receive a portion of the pension benefits payable to the Husband

from the Operating Engineers Pension Trust is a claim based upon rights arising under California community property law, not "under the terms of the plan."

Whether California community property law giving rise to a claim against an employee benefit plan is preempted by ERISA, requires clarification, interpretation, and application of ERISA. The federal courts, not state courts, were expressly intended by Congress to have exclusive jurisdiction of actions to clarify, interpret and apply ERISA. The legislative history of ERISA makes this clear. *Legislative History of the Employee Retirement Income Security Act of 1974*, p. 4594.

This case cannot be fully adjudicated without the interpretation and application of the preemption clause, as well as other substantive provisions of ERISA. Therefore, the federal courts were the only proper forum to determine the claims against the Pension Plan in this case.

5. The Issues Presented Importantly Affect the Day-to-Day Administration of Substantially All Pension Plans.

The Trustees of the Operating Engineers Pension Trust are now actively engaged in litigation and appeal in more than fifty marital dissolution proceedings in seven counties of California. In each case, the non-participant spouse of a participant in the Trust is seeking an order directing the Trust to pay a portion of the pension benefits payable to the participant directly to the non-participant spouse. In many of the cases the non-participant spouse has also requested an order

restraining the Trust from paying pension benefits to the participant pending the determination of the non-participant spouse's interest in Trust benefits. Seven of these cases, including the instant case, have resulted in judgments necessitating an appeal by the Trust.

Other employee benefit plans have been burdened in the same manner. Furthermore, thousands of persons involved in what might otherwise have been routine, inexpensive marital dissolution proceedings now find themselves enmeshed in lengthy and expensive litigation and appeal. Resolution of the issues presented in this petition would benefit all pension plans governed by ERISA, and would benefit the many individual litigants whose marital dissolutions have been affected by the uncertainty in this area of law.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: February 12, 1980.

Respectfully submitted,

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ROBERT SCOT CLIFFORD,
Counsel for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

In re the Marriage of: Betty Lou and Robert W. Lionberger.

Betty Lou Lionberger, Appellant and Cross-respondent vs. Robert W. Lionberger, Respondent. Operating Engineers Pension Trust, Cross-appellant. 2d Civ. No. 54977 (Super Ct. No. SED 23460).

Filed: Sept. 20, 1979.

APPEALS from a judgment of the Superior Court of Los Angeles County. W. James Turpit, Judge. Modified and affirmed.

Marvin Licker for Appellant and Cross-respondent Betty Lou Lionberger.

Martin Goldberg for Respondent Robert W. Lionberger.

Wayne Jett by Robert Scot Clifford for Cross-appellant Operating Engineers Pension Trust.

Appellant, Betty Lou Lionberger, has appealed from that portion of an interlocutory judgment of dissolution of marriage which provides that spousal support payable to her by respondent Robert W. Lionberger shall terminate on July 15, 1980.

Cross-appellant, Operating Engineers Pension Trust, appeals from that portion of the interlocutory judgment of dissolution of marriage which declares that the interest of husband in the pension plan of the Operating Engineers Pension Trust is community property and which awards a portion thereof to wife.

Summary of the Facts

Husband and wife were married on December 24, 1953, and separated on September 26, 1973. A petition for dissolution of the marriage was filed by wife, listing as a community asset, inter alia, husband's pension or retirement fund through his employment.

During the pendency of the dissolution proceedings, petitioner joined as a third-party defendant the Operating Engineers Pension Trust, administrator of the pension and retirement plan protecting Operating Engineers Local 12, of which husband was a member.

On April 13, 1978, the court entered interlocutory judgment of dissolution in the action. The award of spousal support and the division of all community property was made pursuant to stipulation of the parties, with the exception of the disposition of husband's retirement and pension benefits.

Determination of Spousal Support

On July 30, 1976, counsel and the court conferred in chambers concerning a proposed settlement of the marital dissolution action. Thereafter, in open court, in the presence of counsel and the parties, counsel for respondent read into the record the terms of the stipulation just entered into. With respect to the spousal support the record reflects the following:

> "Then the respondent is to pay to the petitioner, as and for spousal support, the sum of $175 per month, payable one-half on the 1st and one-half on the 15th of each month, commencing August 1, 1976, and continuing monthly thereafter for a period of four years.
>
> "THE COURT: Well, that would be to and including the payment on July 15, 1980.

> "MR. DAY: Correct, Your Honor.
>
> "THE COURT: And the Court will not reserve jurisdiction beyond that latter date."

No objection was voiced by counsel for appellant with respect to any of the foregoing terms. The interlocutory judgment ultimately entered in this matter contained an identical provision with respect to spousal support, providing that such support was to continue "to and including July 15, 1980, for a period of four years, at which time all spousal support shall forever terminate."

Appellant moved to set aside that portion of the interlocutory judgment which provided for termination of spousal support, on the basis of mistake, inadvertence, surprise, or excusable neglect. That motion was denied by the trial court.

On appeal, appellant states that during the conference in chambers prior to the hearing on July 30, 1976, counsel for appellant stated to the court: "I believe that petitioner will go along with the $175.00 per month for four (4) years but will not agree to any termination of spousal support."

Appellant argues that the provision for termination of spousal support was not pursuant to stipulation of the parties and that the interlocutory judgment is in error in so reflecting. However, the record on appeal contains no transcript of the in-chambers conference to which appellant refers. It is thus impossible for this reviewing court to evaluate appellant's claim. The remedy available to appellant in the absence of such a record was a motion before the same court to set aside the judgment. That motion was heard and the court, cognizant of the facts, denied it.

Further, the record we do have, of the proceedings in open court, reflects that counsel for appellant made no objection to the court's statement that it would not reserve jurisdiction beyond the four-year period.

On August 19, 1976, the parties and their counsel returned to court for resolution of remaining issues in the dissolution action. The amount and termination date of support payments was again discussed by court and counsel. No objection to the four-year termination was raised by or on behalf of appellant.

Whether or not appellant stipulated to the termination of support at the end of four years, her failure to object to the court's inclusion of that provision in the decree amounts to an implied waiver of her right to raise that contention on appeal. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 319.)

In *In re Marriage of Hendle* (1976) 56 Cal.App.3d 814, following a conference in chambers, the court announced its rulings with respect to division of community property. Husband challenged the order on appeal. The appeals court first observed, at page 817: "Admittedly, the husband was then in court; admittedly the court's order was clearly and slowly announced; admittedly the husband voiced no objection to the order." The court held at page 818.

> "While an attorney may not bind his client to a stipulation regarding the division of community property without the client's knowledge and assent, a litigant cannot sit idly by, in open court, while a stipulation is read and approved by the court, and later deny the authority of his trial counsel to enter into the stipulation thus announced. While it may be better practice for the trial court to inquire into the litigant's assent to the stipulation, we know of no rule that makes such an omission fatal where, as here, the litigant, by his silence, gave every appearance of assent."

In the instant case, both appellant and her attorney remained silent while the court recited the provision respecting termination of spousal support. The silence of counsel under the circumstances, on two occasions in open court, is tantamount to assent to the provision (*McBain v. Santa Clara Sav. & Loan Ass'n* (1966) 241 Cal.App.2d 829, 838), and that assent is binding on appellant (*Cameron v. Cameron* (1948) 88 Cal. App.2d 585, 595), particularly where, as here, appellant was present in court when the ruling was made.

Appellant having impliedly consented to the provision complained of, she has waived her right to cite the ruling as error on appeal.

Cross-Appeal of Operating Engineers Pension Trust

Cross-appellant (hereinafter "the trust") raises the following contentions on appeal:

1. This court has no jurisdiction over the within matter because federal courts have exclusive jurisdiction concerning application of the provisions of ERISA.

2. ERISA pre-empts state law, thereby precluding the application of California community property law to the distribution of benefits from the trust.

3. The order commanding the trust to pay benefits directly to the wife is contrary to the provisions of ERISA.

4. The order commanding the trust to pay benefits directly to the wife harms the participants and bene-

ficiaries of the trust and is unnecessary to protect the interest of the wife.

5. The order precluding the trust from honoring any election by the husband to receive a joint and survivor annuity is contrary to the provisions of ERISA.

6. The order declaring that the wife's interest in benefits payable from the trust is alienable and inheritable is contrary to law.

State Court Jurisdiction

The trust contends that under the provisions of the Employee Retirement Income Security program (hereinafter "ERISA") found at United States Code Annotated Title 29, sections 1001 et seq., the federal court has exclusive jurisdiction to clarify, interpret, and apply ERISA to California retirement programs.

Section 502(e)(1) of ERISA (29 U.S. Code, § 1132(e)(1)) states: "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The exception to exclusive federal jurisdiction reads as follows: "(a) A civil action may be brought—[¶] (1) by a participant or beneficiary—[¶] . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . ." (29 U.S.C. § 1132(a)(1)(B).)

The trust argues that this is not an action brought to clarify rights under the terms of the plan. We disagree. In recent years, numerous federal district courts have considered the jurisdiction issue posed in the instant case and have concluded that federal courts do not have exclusive jurisdiction. In *Stone v. Stone* (1978) 450 F.Supp. 919, a divorced wife brought an action against her former husband and the administrator of his pension plan, alleging non-compliance with the divorce court's order that a percentage of the monthly pension payments be made to her. The pension plan removed the action to the federal district court. The *Stone* court concluded that although intervention in a state divorce proceeding by federal courts was improper, because of the nature of the action brought by Mrs. Stone against the pension plan, the federal court had *concurrent* jurisdiction and could proceed to reach the merits. The court found that the wife's action was brought under section 1132(a)(1)(B). She sued as a transferee of the participant's right to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ." (29 U.S.C. 1132(a)(1)(B).)

In *Carpenters Pension Trust, etc. v. Kronschnabel* (1978) 460 F.Supp. 978, an action was brought by a pension trust to nullify state court orders which included pension benefits as community property, on the ground that ERISA pre-empts all state law with respect to pensions. The court found that the state court had exercised its proper jurisdiction in awarding pension benefits to the non-employee spouse, stating at page 983: "For this court to prevent the California courts from effectuating the state's community property

laws in the absence of a clear message from Congress would be to undermine the principles of federal-state comity from which the preemption doctrine draws its authority in the first instance."

In *In re Marriage of Pardee* (1976) 408 F.Supp. 666, the pension trust attempted to remove a dissolution action from state to federal court, contending that ERISA mandated federal jurisdiction. The court concluded that "the congressional scheme does not permit removal, . . ." (*Id.* at p. 668.)

The State of California has exclusive jurisdiction over domestic relations actions brought by California residents to determine their rights in California property. (*In re Burrus* (1890) 136 U.S. 586, 593.) In addition, the state has concurrent jurisdiction with the federal courts to the extent that one of the assets of the domestic relations action is a pension or retirement plan governed by ERISA. (*Stone v. Stone, supra,* 450 F.Supp. at pp. 921-923; 29 U.S. Code Anno., § 1132(e)(1).)

Pre-emption by ERISA

Issues 2, 3, and 4 concerning federal pre-emption of California community property law are identical to the issues raised and resolved in this court's recent opinion in *In re Marriage of Johnston* (1978) 85 Cal.App.3d 900. Appellant acknowledges that in that opinion this court concluded that the division of pension benefits and their distribution by the trust directly to the non-employee spouse were not in violation of ERISA and that ERISA does not pre-empt California's community property law. However, the trust contends that those holdings are in error and requests that

they be reexamined.[1] Having done so, we are convinced that ERISA contains no evidence of congressional intent to pre-empt state marital property laws.

In its reply brief, the trust cites a recent Supreme Court decision, *Hisquierdo v. Hisquierdo* (1979) .... U.S. ....; 59 L.Ed.2d 1; 99 S.Ct. ..... The trust argues that this decision "furnishes additional persuasive support for the proposition that ERISA preempts California community property law and precludes the order directing the trust to pay benefits directly to the wife."

In that case, the high court reversed the California Supreme Court and held that benefits payable to an employee from the Federal Railroad Retirement Act may not be divided under a state's community property law. The Supreme Court's decision in *Hisquierdo* was based on a number of special provisions in the Railroad Retirement Act which compelled the conclusion that Congress intended that the benefits flow only to the employee and his wife, while they are married. The court explained:

> "It [the Act] also makes detailed provision for a worker's spouse; the spouse qualifies for an individual benefit if the spouse lives with the employee, and receives regular contributions from the employee for support, or is entitled to support

---

[1]The argument of the trust that ERISA pre-empts all California law with respect to pension benefits is not aided by its argument with respect to jurisdiction. On page 6 of appellant's opening brief, in support of its contention that this action is not one allowing concurrent federal and state jurisdiction under the Act, the trust argues: "Wife's claim that she is entitled to receive a portion of the pension benefits payable to Husband from the Operating Engineers Pension Trust is a claim based upon rights arising under California community property law, not 'under the terms of the plan.' "

from the employee pursuant to a court order. Section 231a(c)(3)(i). The benefits terminate, however, when the spouse and the employee are absolutely divorced. Section 231d(c)(3)." (*Id.* at p. 7.)

The court observed that "Congress carefully targeted the benefits created by the Railroad Retirement Act. It even embodied a community concept to an extent. The Act provides a benefit for a spouse. . . . Congress purposely abandoned that theory, however, in allocating benefits upon absolute divorce. In direct language the spouse is cut off: . . . . The choice was deliberate. When the Act was revised in 1974, a proposal was made to award a divorced spouse a benefit like that available to a divorced spouse under the Social Security Act. The labor-management negotiation committee, however, rejected that proposal, and Congress ratified its decision." (*Hisquierdo v. Hisquierdo, supra,* 59 L. Ed.2d at pp. 12-13.)

The court also pointed out that, unlike most pension plans, Railroad Retirement Act benefits have strong federal overtones in that "[c]ompulsory federal taxes finance them and not just the taxes that fall on the employee." (*Id.* at p. 11.) The court concluded that Congress had expressly enacted legislation to protect the retired worker alone and that it thus remains within the province of Congress to extend that provision to the worker's divorced spouse. Therefore, the California Supreme Court was in error in dividing the Railroad Retirement Act benefit between the parties.

The *Hisquierdo* decision is clearly distinguishable from the facts of the instant case. The dissolution action here involves a pension and retirement plan

whose only relationship with the federal government is that it, along with all other qualifying plans, is regulated by ERISA. ERISA contains no express provisions limiting or even discussing the rights of divorced spouses with respect to governed plans. "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Caluse to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. (*Wetmore v. Markoe,* 196 U.S. 68, 77, 49 L.Ed. 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell,* 382 U.S. 341, 352, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966)." (*Hisquierdo v. Hisquierdo, supra,* 59 L.Ed.2d at p. 11.)

Our conclusion in *Johnston v. Johnston, supra,* 85 Cal.App.3d at p. 912, is repeated here:

"We conclude that the preemption clause of ERISA does not affect the operation of California community property laws; that ERISA does not interfere with the power of California courts to divide pension benefits between a husband and wife and to order direct payments of those benefits to a nonemployee spouse; that California community property law does not relate to and is thus not included in federal regulation of any pension benefit plan."

The Order Precluding Husband's Election of a Joint and Survivor Annuity

In the interlocutory judgment of dissolution of marriage, entered April 13, 1978, the court found that husband had accumulated approximately 17 "credits" in the Operating Engineers Pension Trust, all of which credits were the community property of husband and wife. The court ordered: ". . . each party is hereby awarded as his or her separate property a share which equals one-half of the ratio of 17.0531 credits to the total number of credits respondent has at the time of his retirement. . . ."

The trustee was ordered to pay to the wife, as received by the husband, an amount each month which is the equivalent of the above award.

The Trust now contends that the following provision in the decree constitutes an improper intrusion into the administration of the Trust and is violative of California law:

> "The Trustees of Third Party Defendant are further directed not to honor or comply with any elections or direction by respondent (such as election to himself and his surviving spouse) which might lessen or diminish petitioner's share of monthly payment or prolong the term of payment to petitioner. Respondent is directed and ordered to execute any election or designation which may be required for him and his surviving spouse not to receive a joint annuity, and the Trustees of Third Party Defendant are directed to pay benefits to respondent only in a form other than a joint annuity."

The Pension Plan in question provides at Article IV, Section 4, that in lieu of the form of pension provided in the plan, ". . . a Participant may elect to receive an actuarially reduced monthly pension for life, based on his age and sex and the age and sex of a Contingent Annuitant, commencing on the same date as the monthly pension otherwise payable to him with provision for the continuance of such reduced monthly pension after his death to a Contingent Annuitant." The Plan also provides that such survivor annuity is payable only if "the Contingent Annuitant is the spouse of the Participant."

It is settled law in California that if a Pension Plan provides for payment to a spouse after the death of a participant, either by way of a lump sum death benefit or continuing monthly payments, the beneficiary must have been married to the participant at the time of his death. (*Waite v. Waite* (1972) 6 Cal.3d 461, 472.) Therefore, the effect of an election by the employee spouse to convert his pension benefits to those available under the joint and survivor annuity provisions of the Plan, would be to reduce the monthly income payable during the Participant's life and increase the benefits payable after his death. Because the divorced wife's right to share in pension benefits terminates with the death of the husband, the monetary value of her interest in the pension benefits would be reduced by such an election. It was obviously this result which the trial court attempted to avert by its order prohibiting the husband from selecting the joint and survivor annuity provisions.

The Trust contends that the court erred in making such a ruling, citing the following language from *In*

re Marriage of Brown (1976) 15 Cal.3d 838, at pages 849-50:

> "As to the claim that our present holding will infringe upon the employee's freedom of contract, we note that judicial recognition of the nonemployee spouse's interest in vested pension rights or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits), or to elect between alternative retirement programs. We do not conceive that judicial recognition of spousal rights in nonvested pensions will change the law in this respect. The employee retains the right to decide, and by his decision define, the nature of the retirement benefits owned by the community."

The issue presented is whether the Supreme Court intended, by the foregoing language, to empower the participant spouse to reduce the community interest of the non-participant spouse by his election of benefits after dissolution of the marriage. As we will explain, we do not believe that the Supreme Court intended such a result.

We note at the outset that the *Brown* court itself, as part of the same discussion quoted by the Trust, limited the right of the employee spouse to select among planned benefits. "In *Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131, and *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 447 . . . we held that a public employee's property interest in his pension rights does not prevent the public entity from modifying those rights so long as the modification is reasonable and does not result in net disadvantage to the employee. By the same reasoning recognition of the spouse's property interest should not bar a reasonable, *nondetrimental* modification of the pension system." (*In re Marriage of Brown, supra*, 15 Cal.3d at page 849, fn. 11.) (Emphasis added.)

The change contemplated here would be detrimental to the wife. The court has awarded to her a portion of the interest in the pension plan as her community property. Her interest in that property is vested, although not yet matured.

The alteration of benefits from the right to monthly payments during his life to the rights granted under the Joint and Survivor Annuity Program would, to the extent that the wife's interest is reduced, transfer her interest from the parties' community property to the husband's separate property. Such a transfer is not permitted under California law. Any uncertainty raised by the quoted statement in the *Brown* opinion is clarified by holding of the Supreme Court in *In re Marriage of Stenquist* (1978) 21 Cal.3d 779. In that case, husband, a serviceman eligible for full retirement, elected to receive disability payments rather than retirement benefits, the disability benefits being at a higher monthly rate. Husband contended that, according to California law, the disability income was his separate property. The Supreme Court stated at page 786:

> "We cannot permit the serviceman's election of a 'disability' pension to defeat the community interest in his right to a pension based on longevity. In the first place, such a result would violate the settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (See *Waite v. Waite* (1972) 6 Cal.3d 461, 472 . . . *In re Marriage of Peterson* (1974) 41 Cal.

App.3d 642, 650-651. . .)[5] As the court explained in *In re Marriage of Mueller* (1977) 70 Cal.App. 3d 66 . . . a case indistinguishable from the present appeal, the employee spouse retains the right to determine the nature of the benefits to be received.[6] It would be inconsistent with community property principles 'to permit that spouse to transmute what would otherwise be community property into his or her separate property.' (70 Cal.App.3d at pages 71-72.)"

Footnote 5: "While in *In re Marriage of Brown, supra*, 15 Cal.3d 838, 851, footnote 14, we disapproved dicta in *Waite* and *Marriage of Peterson* to the effect that non-vested pension rights were not community property, we did not disapprove the holding in those cases that one spouse could not by election destroy the community interest of the other spouse."

Footnote 6: "Recognition of the nonemployee spouse's interest in the 'disability' pension would not limit the employee's freedom 'to elect between alternative retirement programs.' (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 849.) Any serviceman eligible to receive 'disability' payments higher than ordinary retirement benefits would remain free to elect the higher payments if he so chose."

The Supreme Court's statement that the serviceman remained free to choose any monthly income ***higher*** than that to which he would be otherwise entitled explains the limited extent to which the husband remains free to "agree to a modification of the terms of his employment (including retirement benefits), . . ." (*In re Marriage of Brown, supra*, 15 Cal.3d at page 849.)

Therefore, the contention of the Trust that the court did not have the power to preserve the wife's interest in the community by ordering the husband to maintain that interest in the form held at the time of divorce is not well taken. As the Supreme Court observed in *Brown, supra*, at page 848, footnote 10:

> "Our suggestion in *Phillipson v. Board of Administration, supra*, 3 Cal.3d 32, 46, that when feasible the trial court should award the employee all pension rights and compensate his spouse with other property of equal value, was not intended to tie the hands of the trial court. That court retains the discretion to divide the community assets in any fashion which complies with the provisions of Civil Code section 4800."

In *In re Marriage of Freiberg* (1976) 57 Cal.App.3d 304, at page 312, the court summarized the power of the court in distributing community property as follows:

> "As a general rule, in selecting a method to effect distribution of the community interest in retirement rights the court acts in the exercise of judicial discretion and its determination respecting such will not be interfered with on appeal unless an abuse of discretion is shown. The criterion governing judicial action is reasonableness under the circumstances. The method adopted may vary with the facts in each case."

In *Ball v. McDonnell Douglas Corp.* (1973) 30 Cal.App.3d 624, the husband made a choice opposite to the one contemplated here. After a divorce decree which awarded a one-half interest in pension funds to the wife, husband employee elected to take higher monthly payments and forfeit death benefits. He died

shortly thereafter and the wife sued contending he had no right to make such an election. In rejecting her contention, the court observed at pages 630-631:

> "Plaintiff . . . could have requested that the court direct that no election be made by the husband which could, however indirectly, result in extinguishment of eligibility to draw from the plan. This she failed to do . . . .
>
> "Under the provisions of the pension plan Patterson had the right to determine when, in the future, and in what amounts the benefits available to him would best serve his economic situation. It is clear that the divorce decree *did not* give plaintiff Costello a right to control Patterson's ability to plan his future. She would have had no such control during the marriage and ***in the absence of a specific provision in the decree she*** gained no such right by virtue of the divorce." (Emphasis added.)

We see no infirmity in the court's order in this case. Further, contrary to the contention of the Trust, the order does not appear to violate the provisions of ERISA.

> "The regulations promulgated pursuant to Erisa have interpreted the power of election with respect to joint and survivor annuity benefits as not being an unfettered right. With respect to the option at normal retirement age *not* to take the joint and survivor feature, the regulations provide: 'A plan will not fail to meet the requirements of this section merely because the plan requires the participant to obtain the written approval of his spouse in order for the participant to make this election or if the plan provides that such approval

> is not required.' [Treas. Reg. § 1.401 (a)-11(c)(1)(B) (1977).] In other words, Erisa is construed as not itself controlling how an election shall be made against a joint and survivor annuity. The states are invited to impose a written consent requirement such as that found in California Civil Code section 5125(b)." (Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA," Reppy, 25 UCLA L.Rev. 417, 523 (1978).)

Alienability of the Wife's Interest

The Interlocutory Decree of Dissolution contains the following provision: "Petitioner's interest is alienable, inheritable and assignable in the same manner as respondent's interest in the pension or retirement plan of the Third Party Defendant."

As previously noted in this opinion, the wife's interest in the pension benefits extends only to monthly payments payable to husband during his life. Under the terms of the Plan, and pursuant to numerous California decisions, wife has no right to nor interest in any sums payable after the husband's death. A similar order was analyzed and found in error by the California Supreme Court in *Waite v. Waite, supra,* 6 Cal.3d 461. The court held at pages 472-473:

> "The superior court ordered the Controller to 'pay directly to plaintiff herein ***or her devisee or heirs*** one half of all benefits which may be payable under the Judge's Retirement Act by reason of the services of defendant Waite.' (Italics added.) Defendant objects to the italicized language favoring plaintiff's heirs or devisees; he

correctly contends that if plaintiff dies before him, her share of the monthly pension payments should then go directly to him, and not to plaintiff's estate . . . .

"The state's concern, then, lies in provision for the subsistence of the employee and his spouse, not in the extension of benefits to such persons or organizations the spouse may select as the objects of her bounty. Once the spouse dies, of course, her need for subsistence ends, and the state's interest in her subtenance reaches a coincident completion. When this termination occurs, the state's concern narrows to the sustenance of the retired employee; its pension payments must necessarily be directed to that sole objective." (See also, *In re Marriage of Peterson* (1974) 41 Cal. App.3d 642, 654; *In re Marriage of Bruegl* (1975) 47 Cal.App.3d 201, 206.)

Therefore, the court erred in finding that the petitioner's interest in the Pension Plan is alienable, inheritable and assignable.

The Interlocutory Judgment is modified to strike therefrom the following sentence found at page 7, lines 2 through 5 thereof: "Petitioner's interest is alienable, inheritable and assignable in the same manner as respondent's interest in the pension or retirement plan of the Third Party Defendant." In all other respects the judgment is affirmed. Costs on appeal are awarded to cross-respondent to be paid by cross-appellant Operating Engineers Pension Trust.

CERTIFIED FOR PUBLICATION.

ALARCON, *J.*

I concur:

KINGSLEY, *J.*

JEFFERSON (Bernard), *J.*

I concur in part and dissent in part.

I agree with the majority's opinion with the exception of the majority's determination that affirms the trial court's judgment that spousal support to appellant-wife be terminated at the end of a four-year period without any reservation of jurisdiction to order further support in the future.

The majority holds that appellant-wife's right to attack the termination provisions of spousal support set forth in the interlocutory judgment is barred either (1) on the ground that appellant had stipulated below for such termination, or (2) that here was a failure by appellant to object to the trial court's inclusion of such provisions in the judgment and that such failure amounts to an implied waiver of the right to assert error on appeal.

On the question of waiver, the majority relies upon *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, in which it was held that, in a personal injury action, defendant had waived the right to object on appeal to plaintiff-counsel's trial misconduct by failing to object to such counsel's trial misconduct and failing to request the trial court to admonish the jury to disregard such misconduct.

But the majority's reliance upon *Sabella* is without reasonable foundation. The *Sabella* court made it quite clear that its decision rested upon the circumstances of the particular case. Thus, the *Sabella* court observed: "Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing

the jury, and the efficacy of objection or admonition under all the circumstances." (*Id.* at pp. 320-321; fn. omitted.)

The issue presented in the case at bench is not at all similar to the issue presented in *Sabella.* In addition, it is to be noted that *Sabella* was decided by a divided court. In his dissenting opinion in *Sabella,* Chief Justice Traynor commented that "[n]o admonition, however, could cure the prejudicial effect of such misconduct as prevailed throughout this case. Accordingly, defendant's failure to request admonitions to the jury does not preclude it from challenging the misconduct on appeal." (*Id.* at pp. 324-325.) It is my view that, in terms of fairness and justice, the dissenting opinion in *Sabella* presents a far better rule than that announced by the *Sabella* majority.

In the matter before us, the majority also relies upon the case of *In re Marriage of Hendle* (1976) 56 Cal.App.3d 814, in which the court held that there was a failure by appellant and his counsel to voice an objection to the trial court's statement of an alleged oral stipulation of the parties and that such failure to object amounted to a *consent* to the stipulation as announced by the trial court.

The *Hendle* case involved the issue of a division of community property, while the case at bench involves the question of termination of spousal support. *Hendle* is similar to the case at bench in that there was no trial or determination of the issues by the trial court upon evidence presented, but a decision based upon an asserted oral agreement between the parties.

I dissented in *Hendle* and set forth the view that the majority result was erroneous. (See *Hendle, supra,* 56 Cal.App.3d 814, 818-824 (dis. opn. of Jefferson,

J.).) The majority's view in the case at bench is equally as untenable as was the majority's view in *Hendle.* The record before us does not support the majority's conclusion that the appellant wife had entered into an oral stipulation with respondent husband for a termination of spousal support at the end of four years without any reservation of jurisdiction by the court to order further spousal support.

"The definition of a stipulation is well established in the law. 'A stipulation is an agreement between counsel respecting business before the court [citation], and like any other agreement or contract, *it is essential that the parties or their counsel agree to its terms.*' (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142 [199 P.2d 952].) (Italics supplied.) It is equally clear that an attorney has authority to bind his client in any of the steps of an action or proceeding by entering into a valid stipulation. (See Code Civ. Proc., § 283.) '"Such a stipulation . . . when made in open court . . . constitutes not only an agreement between the parties, but also one between them and the court, which the court is bound to enforce for the benefit of those interested and for the protection of its own honor and dignity." [Citation.]' (*Barendregt v. Downing* (1959) 175 Cal.App.2d 733, 736 [346 P.2d 870].)" (*Marriage of Hendle, supra,* 56 Cal.App.3d 814, 818-819 (dis. opn. of Jefferson, J.).)

It is my view that the record of the trial court proceedings below demonstrates, without equivocation, that appellant wife did *not* enter into any oral stipulation with respondent husband for the termination of spousal support without any reservation of jurisdiction in the trial court to order further spousal support at the end of the four-year period. "Although there are no magic

words which counsel or the court must use to effectuate a stipulation in open court, nor is any particular formality required, the language and conduct must be such as to indicate an assent to the terms of the alleged stipulation." (*Marriage of Hendle, supra*, 56 Cal.App.3d 814, 822 (dis. opn. of Jefferson, J.).)

The record below establishes only that the stipulation for spousal support was stated in open court by counsel for respondent husband and that such counsel did *not* state, as a part of the stipulation or otherwise, that there would be no reservation of jurisdiction in the trial court to modify the spousal support provisions beyond the period of four years.

After counsel for respondent husband stated that the spousal support would last for a period of four years, the trial judge spoke up and remarked: "Well, that would be to and including the payment on July 15, 1980." Respondent-husband's counsel replied: "Correct, Your Honor." The trial judge then gratuitously added: "And the Court will not reserve jurisdiction beyond that latter date." The record reflects that respondent-husband's counsel did not comment upon this statement of the trial judge. Counsel made no statement as to whether this nonreservation-of-jurisdiction statement of the trial judge constituted a part of the stipulation of the parties, but simply proceeded to announce another portion of the parties' agreement with respect to the payment of attorney's fees.

Since respondent-husband's counsel made no reply with respect to whether the trial judge was correct in the judge's gratuitous statement as to non-reservation of jurisdiction, I can find no logic or reason to support the majority's holding that appellant wife or her counsel was required to raise an objection that the trial judge's

pronouncement was *not* part of the stipulation of the parties. I can find no duty on appellant wife or her counsel to respond to the trial judge when counsel for respondent husband, who was reciting the stipulation, made no reference to the trial judge's interjection.

The record also reflects that, on a subsequent date approximately three weeks later, respondent's counsel stated in open court: "I didn't have a commencement date on the spousal support, but it was to be for a period of four years." The court then stated: "Yes. That I have down here, too, somewhere. A hundred and—What did you say?" To this question respondent's counsel replied: "$175 per month, Your Honor." The trial court then stated: "My notes indicate August 1, 1976; terminating with the payment on July 15, 1980. [¶] Now, Mrs. Lionberger, would you come up here? There are one or two brief questions which we neglected to ask the last time. [¶] Raise your right hand and be sworn, please." Appellant was then questioned about other matters, but nothing at all about the length of spousal support or the nonreservation of jurisdiction to modify spousal support.

For the majority to hold that, upon this record, appellant had entered into an oral stipulation for a nonreservation of jurisdiction to modify the four-year provision for payment of spousal support, constitutes a decision based upon pure surmise, speculation and conjecture. It is to be noted that, at no point in the record, does it appear that the trial judge asked appellant wife or appellant-wife's counsel whether appellant was agreeing to a provision for nonreservation of jurisdiction to deal with spousal support at the conclusion of the four-year period. It is of utmost significance in the instant case that the only question about nonreservation of jurisdiction was put by the

trial judge to respondent-husband's counsel—as a statement and not as a question—and that counsel for respondent husband made no response to the trial court's gratuitous statement.

The majority's holding, in reliance upon *Marriage of Hendle,* that the record in the instant case establishes that appellant had entered into an oral stipulation with respondent in open court for the nonreservation of jurisdiction to modify spousal support "put a stamp of approval upon a trial court procedure which makes a mockery of the *Palmer* court's statement that '[u]nless it is clear from the record that both parties assented, there is no stipulation.' " (*Marriage of Hendle, supra,* 56 Cal.App.3d 814, 823 (dis. opn. of Jefferson, J.).)

I consider the law to be that, if a trial judge states for the record in open court a stipulation which he believes was made by the counsel for the parties in a chambers conference, he has a mandatory obligation to ask all counsel and the parties present in open court whether the court's statement of the stipulation represents the agreement of the parties. Nothing short of this procedure should be tolerated. If a trial judge fails to follow this procedure, a party should not be held to have entered into an oral stipulation through any process of implied consent or waiver.

I would thus reverse that portion of the interlocutory judgment which provided for the payment of spousal support for a period of four years "at which time all spousal support shall forever terminate," and order a modification of the judgment to provide for a reservation of jurisdiction in the trial court to order payment of spousal support following the expiration of the four-year period.

Jefferson (Bernard), *J.*

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Nov. 15, 1979.

I have this day filed Order Hearing Denied.

In re: 2 Civ. *No.* 54977 Lionberger vs. Lionberger.

Respectfully,

G. E. BISHEL, *Clerk*

APPENDIX C.

Statutory Provisions Involved.

1. 26 U.S.C. §401 provides in pertinent part:

(a) Requirements for qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . .

2. 28 U.S.C. §1257 provides, in pertinent part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution,

treaties or statutes of, or commission held or authority exercised under, the United States.

3. 29 U.S.C. §1002 provides, in pertinent part:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

4. 29 U.S.C. §1055 provides, in pertinent part:

(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

5. 29 U.S.C. §1056 provides, in pertinent part:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

6. 29 U.S.C. §1102 provides, in pertinent part:

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(b) Every employee benefit plan shall—

(4) specify the basis on which payments are made to and from the plan.

7. 29 U.S.C. §1103 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . .

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under section 1342 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit on any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

8. 29 U.S.C. §1104 provides, in pertinent part:

(a)(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his

duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

9. 29 U.S.C. §1109 provides, in pertinent part:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

10. 29 U.S.C. §1131 provides, in pertinent part:

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

11. 29 U.S.C. §1132 provides, in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan;

(e)(1) Except for action under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

12. 29 U.S.C. §1144 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

13. 45 U.S.C. §231d provides, in pertinent part:

(3) The entitlement of a spouse of an individual to an annuity under section 231a(c) of this title shall end on the last day of the month preceding the month in which (A) the spouse or the individual dies, (B) the spouse and the individual are absolutely divorced, or (C) in the case of a wife who does not satisfy the requirements of clause (ii)(A) of (ii)(B) or section 231a(c)(1) of this title (other than a wife who is receiving such annuity by reason of an election under section 231a(c)(2) of this title), such wife no longer has in her care a child described in clause (ii)(C) of section 231a(c)(1) of this title, whichever first occurs.

14. 45 U.S.C. §231m provides, in pertinent part:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated: *Provided, however,* That the provisions of this section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a(b) of this title from income taxable pursuant to the Federal income tax provisions of Title 26.

14. California Civil Code §4363.1 provides, in pertinent part:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court.

APPENDIX D.

Interlocutory Judgment of Dissolution of Marriage.

Superior Court of California, County of Los Angeles.

In re the marriage of Petitioner: BETTY LOU LIONBERGER and Respondent: ROBERT E. LIONBERGER; Third Party OPERATING ENGINEERS. Defendant: PENSION TRUST. Case number SE D 23460.

FILED April 13, 1978.

This proceeding was heard on July 30, 1976 before the Honorable W. James Turpit, Department No. "A".

The court acquired jurisdiction of the respondent on Jan. 21, 1976 by:

Service of process on that date and respondent having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment

shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The above cause regularly came on for trial on July 30, 1976 in Department Southeast "A" of the above entitled court, before Honorable W. JAMES TURPIT, Judge Presiding, Petitioner personally appeared with her attorney, MARVIN LICKER, Respondent personally appeared with his attorney, WARREN G. DAY and Third Party Defendant personally appeared by its attorney, WAYNE JETT, by JOHN C. FAUVRE, Esquire.

After a discussion in chambers, the petitioner and respondent orally stipulated to a division of the community property except for the respondent's pension plan and such stipulation is reflected in this judgment.

The trial was then continued to August 19, 1976 at 2:00 P.M. in the aforementioned Department for the purpose of adjudicating the remainder of the issues and allowing counsel for the Third Party Defendant an opportunity to prepare Proposed Findings of Fact and Conclusions of Law.

On August 19, 1976, the trial continued in Department Southeast "A" before Honorable W. JAMES TURPIT, Judge Presiding, Petitioner appeared with her counsel, MARVIN LICKER, and testified, Respondent appeared through and by his counsel and the Third Party Defendant appeared by its counsel, WAYNE JETT by JOHN C. FAUVRE, Esquire. Third Party Defendant presented document evidence which was admitted into evidence and after brief argument the matter was submitted subject to preparation of

Findings of Fact and Conclusions of Law and the Interlocutory Judgment of Dissolution by counsel for Petitioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

Respondent is ordered to pay to petitioner, as and for spousal support, the sum of $175.00 per month payable one-half (½) or $87.50 on the 1st day of each month and one-half (½) or $87.50 on the 15th day of each month commencing on August 1, 1976 and continuing each 1st and 15th day of each month to and including July 15, 1980, for a period of four (4) years, at which time all spousal support shall forever terminate.

The following community property division is made pursuant to stipulation of the petitioner and respondent and approved by the Court and made an order of the Court and each of the parties are directed to comply with all of the executory provisions and each of the parties are ordered to execute all of the necessary documents to place title in the condition called for by this Court approved stipulation:

1. The following property is awarded to petitioner as her sole and separate property:

A. The real property known as 14540 Hawes, in the City of Whittier, County of Los Angeles, State of California and more particularly described as: The Northwesterly 59 feet of the northeasterly 130 feet of Lot 7 in Block 1 Tract No. 505, in the County of Los Angeles, State of California, as per map recorded in book 15 page 94 and 95 of Maps, in the office of the County Recorder of said county. EXCEPT the interest in any and all oil and gas rights in anywise appertaining to the said real property excepted in deed from W. C. SHELTON and RUTH Z. SHELTON, his wife, to H. AUF der HEIDE and ELIZABETH AUF der HEIDE, his wife, recorded February 20, 1925, in book 4917 page 170, Official Records, which excepts one-half, and in deed from JACOB G. HOOTMAN and LAVORA M. HOOTMAN, his wife, to JAMES A. ENLOW and NELLIE L. ENLOW, his wife, recorded December 10, 1952 in Book 40494 page 14, Official Records, reciting excepting one-half.

B. The household furniture, furnishings and appliances located in said real property.

C. 1973 Mazda automobile bearing California license number 603 LHY.

D. To equalize the division of the community property, respondent is ordered to pay to petitioner the sum of $2,225.00 within 30 days of or on or before September 1, 1976.

E. The poodle dog.

2. Respondent is awarded as his sole and separate property the following:

A. The real property known as 14702 Hawes, in the City of Whittier, County of Los Angeles, State of California and more particularly described as: Portions of Lot 10 and 11, Block 1, Tract 505, as per map recorded in Book 15, pages 94-95, in the office of the County Recorder of said County, lying northerly of the right of way of the Atchison, Topeka and Santa Fe Railway Company, by

deed recorded in book 6557 page 336 of deeds. Except the northwesterly 210 feet of Lot 10, measured parallel with the northwesterly line of said lot. Also except that portion thereof, included within the land, described in Parcel 143 of the decree of condemnation to Los Angeles County Flood Control District, recorded on March 20, 1956 as instrument no. 3960 in Book 50647, Page 440 of Official Records of said county.

B. All household furniture, furnishing and appliances located in said real property.

C. 1970 El Camino automobile bearing California license number 576 IOV.

D. 1954 Willys automobile bearing California license number 552 EIG.

E. Rototiller.

F. All hand and power tools in respondent's possession.

G. Government "GI" Life Insurance.

H. Union Life Insurance.

Respondent is ordered to pay to counsel for petitioner his additional contributive share of attorney fees, the sum of $375.00 payable $35.00 per month on the 1st of each month commencing on September 1, 1976 and continuing each 1st of the month thereafter until said sum is paid in full.

The court finds that Respondent has earned certain monthly retirement benefits, disability retirement benefits, before retirement benefits and death benefits under the Operating Engineers Pension Trust, joined in this action as Third Party Defendant, during the marriage all of which benefits are the community property of Petitioner and Respondent. The court, further, finds

that between the date of marriage, namely, December 24, 1953, of the parties hereto (petitioner and respondent) and the date of their separation, namely, August 30, 1975, respondent has accumulated a total of 17.0531 current "credits" in the said Operating Engineers Pension Trust (Third Party Defendant) hereinafter called "Pension Trust", based upon a total of 1,000 hours of work per 'credit' which the court finds to be vested pension credits that can not be lost by later events. The court, further, finds that all of said pension credits of 17.0531 are the community property of Petitioner and Respondent and each, Petitioner and Respondent, are entitled to, and each party is hereby awarded as his or her separate property a share which equals one-half of the ration of 17.0531 credits to the total number of credits respondent has at the time of his retirement whether such benefits be normal retirement, before normal retirement, disability retirement, after retirement age but before retirement benefits or death benefits. The Trustees of the Operating Engineers Pension Trust, Third Party Defendant, are ordered and directed to pay to petitioner, at the time and in the manner respondent receives pension payments (including normal, before normal, after retirement age but before retirement, disability retirement or death benefits), one-half of the amount payable to respondent because of credits earned during the period of time between the date of marriage (date of marriage: December 24, 1953) and date of separation (date of separation: August 30, 1975) at the value per credit applicable to such credits at the date of respondent's retirement. The respondent retains right to determine the date of his retirement. The Trustee of Third Party Defendant are further directed not to honor or comply with any elections or direction by respondent

(such as election to himself and his surviving spouse) which might lessen or diminish petitioner's share of monthly payment or prolong the term of payment to petitioner. Respondent is directed and ordered to execute any election or designation which may be required for him and his surviving spouse not to receive a joint annunity, and the Trustees of Third Party Defendant are directed to pay benefits to respondent only in a form other than a joint annuity. Petitioner's interest is alienable, inheritable and assignable in the same manner as respondent's interest in the pension or retirement plan of the Third Party Defendant. The date of the order is August 19, 1976.

The petitioner's current address is: 14540 Hawes Street, Whittier, California 90604.

Payments due to petitioner under the terms of this Order are payable at such address subject to any changes of address based upon the notarized signature received by the Trustees. If respondent fails to notify the Trustee of any change of address the Trustees are not required to take any affirmative steps to locate petitioner in order to make payment to her, and her interest shall lapse in the same manner as in the event of the lapse or forfeiture of the rights of any other beneficiary of the Pension Trust.

DATED: Apr. 13, 1978.

/s/ W. James Turpit
Judge of the Superior Court

APPROVED AS TO FORM AND CONTENT:
MARTIN GOLDBERG
Attorney for Respondent
WAYNE JETT, LAWYERS
BY: /s/ Albert [Illegible]
Attorneys for Third Party Defendant

SUPREME COURT, U.S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1253

THE OPERATING ENGINEERS PENSION TRUST,

Petitioner,

vs.

BETTY LOU LIONBERGER,

Respondent.

Supplemental Brief in Support of Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

WAYNE JETT, LAWYERS,
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THE OPERATING ENGINEERS PENSION TRUST,

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vs.

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Respondent.

Supplemental Brief in Support of Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner submits this supplemental brief to reply to an argument first raised in the respondent's brief and to call attention to intervening matter not available at the filing of the Petition for Writ of Certiorari.

REASONS FOR GRANTING THIS WRIT.

1. The Joint and Survivor Annuity Is the Standard Form of Benefit Mandated by ERISA and Provided by the Operating Engineers Pension Plan, Not an Optional Form to Be Elected by a Participant.

According to the Provisions of the Operating Engineers Pension Plan (''Plan''), a pension *shall* be paid to a married participant in the form of a joint and survivor annuity (the

"Husband and Wife Pension") unless the participant has filed with the Trustees a timely written rejection of that form of pension (C.T. p. 104).[1]

This provision complies with § 205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), which requires the joint and survivor pension unless the participant takes affirmative steps to reject this form of pension. Therefore, the appellate court's rationale for its order preventing the Operating Engineers Pension Trust ("Trust") from paying benefits to Robert W. Lionberger ("Husband") in the form of a joint and survivor annuity is faulty. The appellate court reasoned, and the respondent has argued in her brief to this Court, that an *election* of the joint and survivor annuity provisions of the Plan would reduce the monthly income payable during the Husband's life and consequently diminish the respondent's community interest. The acceptance of the joint and survivor annuity provided by the Plan and mandated by ERISA does not, however, diminish the monetary value of the non-employee spouse's alleged community interest in pension benefits because that is the form of pension provided unless the alternate form is chosen. The participant's rejection of the joint and survivor annuity could, of course, augment the non-employee spouse's interest in pension benefits. The appellate court's order preventing the Trust from paying benefits in the form of a joint and survivor annuity to the Husband accomplished this augmentation by judicial fiat. As a result the plan participant has been denied the opportunity to provide a lifetime pension for his surviving spouse and the Trust is forced to violate ERISA unless it chooses to disobey the Court's order.

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[1]"C.T." refers to the Clerk's Transcript of the Superior Court proceedings conducted below.

2. The Secretary of Labor Has Concluded That the Type of Order Issued by the Court Below Is Preempted by ERISA.

The Secretary of Labor in his brief *amicus curiae* in *Stone v. Stone*, No. 78-2313, on appeal to the United States Court of Appeals for the Ninth Circuit, although suggesting an implied exception to the anti-assignment provisions of ERISA [29 U.S.C. § 1056(d)], has argued forcefully that ERISA preempts community property law. The Secretary recognized the serious threat of state court orders in favor of nonparticipant spouses conflicting with rights guaranteed to the participant by ERISA. That threat was realized in the present case.[2]

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[2]The Secretary argued as follows: "Community property law if not preempted might also provide a means to the non-participant spouse to interfere with an employee's rights under his plan. Prior to the passage of ERISA, employee benefit plans provided a variety of benefits for participants. Early retirement options, choice of form of benefit, choices of beneficiary and a host of other options intended to allow a participant to tailor his plan benefit to individual needs were provided by many plans. ERISA does not circumscribe this variety except for setting certain minimum standards; on the contrary, it supports a participant's rights by imposing a duty on fiduciaries to act in accordance with plan provisions and by making it a federal offense to interfere with those rights. *See* 29 U.S.C. 1104(a)(1)(D) and 1140.

"California and the other community property states have various provisions defining the rights of spouses in managing the community's property. The exercise of these rights may be inconsistent with federally guaranteed participant rights. For example, Section 205 of ERISA, 29 U.S.C. 1055, provides that if a plan offers its retirement benefit in the form of an annuity, it must allow the participant to elect a joint and survivor annuity. Under this option, the participant may choose to receive an actuarially reduced annuity during his or her own lifetime in exchange for an annuity to be paid to his or her surviving spouse. In the case of a participant who chooses this option to protect a second spouse, the first spouse (who under state law would have a recognized community property interest in the pension payment) will be adversely affected by the actuarial reduction in the amount of the pension benefit payment. But under ERISA, the participant must be permitted the election and, despite any 'property' interest, the first spouse must be precluded from interfering with the participant's choice."

Even if the choice of a joint and survivor annuity reduces the interest of a non-employee spouse, state law must nevertheless yield to the controlling federal law. The need for uniform national standards under ERISA dicates that plan participants and their surviving spouses must be given the same protection in community property states as their counterparts in the rest of the nation.

The Secretary of Labor suggested in his brief in *Stone v. Stone* that *In Re Marriage of Brown*, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976), would dispose of the potential problem of interference by the non-participant spouse in the election by the participant spouse of the joint and survivor annuity mandated by ERISA. The Secretary suggested that, because *Brown* recognized the right of the employee spouse to define the nature of the retirement benefits owned by the community, the interference would be precluded by state law. The appellate court in the present case, however, rejected the *Brown* argument reasoning that the only modification that could be made by the employee spouse would be one that was "non-detrimental" to the non-employee spouse.

3. A Proliferation of Recent State Court Orders Encroach Even More Seriously on the Provisions and Policies of ERISA by Disposing of Death Benefits and Awarding Attorneys Fees to the Non-Participant Spouse.

Apparently emboldened by the appellate court decisions in California which have determined that ERISA does not preempt California community property law, and by this Court's declining to review several of these cases, both the state trial courts and the family law bar in California have accelerated their assault on employee benefit plans.

Under Section 4363.1 of the California Civil Code, the clerk of the court is required to enter an order joining an employee pension benefit plan as a party to a marital dissolution proceeding when any party to the proceeding claims an interest in the plan and makes written application for joinder of the plan. After the joinder is accomplished, the courts have routinely subordinated the provisions of ERISA and the terms of the employee benefit plan to the goal of providing protection for the claimed community property interest of the non-employee spouse.

One court has virtually rewritten the provisions of the Plan of this Trust to accommodate the interest of the non-employee spouse.[3]

In other cases, the non-employee spouses have demanded that employee benefit plans pay their attorney fees for all litigation pertaining to community property rights in the

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[3]In the case *In Re the Marriage of Mantor* (April 23, 1980, 2 Civ. 56395), . . . Cal.App.3d . . . the Operating Engineers Pension Trust was joined in a marital dissolution proceeding and objected to the trial court's order directing the Trust to pay a portion of the employee spouse's pension benefits directly to the non-employee spouse. The Trust also objected to a provision in the order which declared that when the employee spouse died, the non-employee spouse would receive "as her sole and separate property, the remainder of any sums of money left in said Operating Engineers Trust Fund." The Trust urged the Appellate Court to reverse the trial court's order because of the order's conflict with the anti-assignment provisions of ERISA [29 U.S.C. 1056(d] and other substantive provisions of the federal law. The Trust also urged the Appellate Court to reverse the trial court's orders concerning death benefits because even under state law the non-employee spouse has no community property interest in such benefits. It was pointed out to the Court that under the terms of the Operating Engineers Pension Plan if benefits are payable on the death of the participant, it is the *surviving spouse* who receives the benefits. Only if there is no surviving spouse do benefits become payable to a designated beneficiary. Nevertheless, the Appellate Court declared that payment of benefits may be made under the terms of the Plan to the participant's surviving spouse *or* his designated beneficiary and the Court reasoned that, because the participant had agreed to the disposition ordered by the court, the Trust was not harmed. The Appellate Court failed even to discuss the conflict between this disposition and the requirements of ERISA.

plans. Without this Court's guidance, every employee benefit plan which attempts to uphold the mandate of the federal law governing its plan will incur not only the substantial legal costs presenting its own position, but also risks the depletion of its assets by awards of attorney fees to the non-participant spouses claiming an interest in plan benefits.[4]

4. The Implied Exception Theory Advanced by the Solicitor General, Even if Strictly Limited, Is Unworkable and Should Yield to the Complete Preemption in ERISA.

The Solicitor General has concluded that ERISA preempts community property law, but that certain state court decisions, which direct employee benefit plans to pay benefits to the non-employee ex-spouse of a plan participant to satisfy a community property claim, can be upheld on the basis of an implied exception to the anti-assignment provisions of ERISA.[5] The Solicitor General reasoned that because

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[4]In the case *In Re Marriage of Reyes*, 97 Cal.App.3d 876, 159 Cal.Rptr. 84 (1979), the Court of Appeal of the State of California affirmed a trial court's order denying attorney fees to a non-employee spouse who sought the payment from an employee benefit plan joined in the proceeding. The Appellate Court found no basis in California law for an award of fees and rejected the argument of the non-employee spouse that she was entitled to the attorney fees under ERISA [29 U.S.C. § 1132(g] because she had failed to raise the argument at trial or in her opening brief on appeal. Thereafter, the non-employee spouse returned to the trial court requesting attorney fees incurred in opposing the appeal of the employee benefit plan. On April 18, 1980, the trial court, in Case No. 53008 in the Superior Court for the County of Merced, granted the request, stating: "The Court concludes that Section 4370 of the Civil Code does not bar this request for attorneys fees: Section 29 U.S.C. 1132(g) authorizes an allowance of reasonable attorneys fees, that Petitioner is a beneficiary by reason, at least of this Court's Order, and its affirmance on appeal. The jurisdiction of this Court to act on this request for allowance of fees continues."

some courts in common law jurisdiction have held that the anti-assignment provisions of ERISA (and certain other federal statutes with similar anti-assignment provisions) do not bar enforcement of *family support decrees* in common law states, that the non-employee ex-spouse in a community property state deserves the same protection.

The "implied exception" argument is unsound in theory and in practice. If § 514 preempts community property laws as the Solicitor General contends, then there is no legal foundation upon which to build the "implied exception" to the anti-assignment provisions of ERISA. To allow the order in the present case to stand would require an implied exception to the preemption statute (§ 514) permitting the community property laws to affect employee benefit plans, and a second "implied exception" to the anti-assignment provisions to place common law states in the same position as community property states.

In practice, an "implied exception" to the express preemption clause of ERISA will be impossible to limit. The slightest opening in the preemption curtain will be used as a license by state courts for all manner of orders affecting the administration of pension plans. Even without such a license, the experience to this date has given plentiful examples of the willingness of the state courts to proceed in that direction.

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[5]The Solicitor General in his brief before this Court as *amicus curiae* in cases No. 78-1422, Retirement Fund Trust of the Plumbing, Heating, and Piping Industry of Southern California v. Johns, and No. 78-1445, Southern California IBEW-NECA Pension Plan v. Johnston, stated as follows: "Although the courts below erred in concluding that § 514 does not preempt state community property law, we believe that their judgments are correct on the basis of an implied exception to the anti-assignment provisions of ERISA."

The implied exception argument would, of course, not be applicable to the holding by the appellate court below which barred the Operating Engineers Pension Trust from paying benefits to the Husband in the form of a joint and survivor annuity.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

May, 1980.

Respectfully submitted,

WAYNE JETT, LAWYERS,
WAYNE JETT
ROBERT SCOT CLIFFORD
Counsel for Petitioner.

APPENDIX.

Statutory Provisions Involved.

1. Section 205 of Erisa, 29 U.S.C. §1055 provides, in pertinent part:

(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

2. Section 206 of Erisa, 29 U.S.C. §1056 provides, in pertinent part:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

3. Section 404 of Erisa, 29 U.S.C. § 1104 provides, in pertinent part:

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this sub-chapter.

4. Section 502 of Erisa, 29 U.S.C. §1132 provides, in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan:

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

5. Section 510 of Erisa, 29 U.S.C. §1140 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a partic-

ipant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

6. Section 514 of Erisa, 29 U.S.C. §1144 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

7. California Civil Code § 4363.1 provides, in pertinent part:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court.

8. California Civil Code § 4370 provides, in pertinent part:

(a) During the pendency of any proceeding under this part, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the orginial award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding relating thereto. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter augment or modify any award so made. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1253

THE OPERATING ENGINEERS PENSION TRUST,
Petitioner,

vs.

BETTY LOU LIONBERGER,
Respondent.

Response to Petition of Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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Response to Petition of Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the writ of certiorari not be issued to review the judgment of the Court of Appeal of the State of California, Second Appellate District which was filed on September 20, 1979 in said court.

Statement of the Case.

Respondent filed a dissolution of marriage proceeding in the Superior Court of California, County of Los Angeles and in said proceeding joined the petitioner and the Court divided the community property pension plan and ordered petitioner, as trustee of said plan, to pay respondent's share of said pension plan directly to her and ordered the trustee not to honor any election by the divorced husband that would

lessen respondent's community property interest in said pension. Petitioner then appealed through the California courts without any success and finally effected this present appeal.

Issues Presented.

1. Does ERISA preempt California community property laws so that the California courts may not order the petitioner to pay directly to respondent a portion of the petitioner's employee benefit plan or award respondent an interest in the plan or prohibit the petitioner from honoring an exercise of a joint and survivor/option by respondent's former husband (a member of petitioner's plan) if it would lessen respondent's interest in said plan?

REASONS WHY THE WRIT SHOULD NOT BE GRANTED OR ISSUED.

The main thrust of petitioner's petition is the recent case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct 802 (1979). That case involved a railroad machinist who had railroad retirement benefits under the Railroad Retirement Act and in a divorce proceeding his wife was awarded a portion of these pension rights as community property by a California court. This Court, the United States Supreme Court, on the basis or premise that Congress deliberately intended to exclude any benefit to a divorced spouse under the Railroad Retirement Act, reversed the California court.

No such Congressional intent is shown by the petitioner in the present case which is not a Railroad Retirement Act case but one under the regulation of ERISA. With the exception of one federal court, namely, *Francis v. United Tech. Corp.* (1978), for the Northern Federal District, 458 F.Supp. 84, all federal courts have held no preemption under ERISA and that the California domestic relations courts do have jurisdiction to divide ERISA pension benefits as community property. *Stone v. Stone* (1978) 450 F.Supp. 919; *Carpenters Pension Trust, etc. v. Kronschnable* (1978) 460 F.Supp. 978; *In re Marriage of Pardee* (1976) 408 F.Supp. 666. In two recent cases, the present court, the United States Supreme Court, dismissed two appeals on the ERISA issue on the ground that there was a want of a substantial federal question. *Carpenters Pension Trust For Northern California v. Campa*, 78-1445. *So. Cal. IBEW-NECA Pension Plan v. Johnson*, 78-1445. *In the case of Retirement Fund Trust of Plumbing-Heating-Piping Industry of So. Cal. v. Johns*, 78-1422, this Court denied certiorari.

The *Hisquierdo v. Hisquierdo* case is rather unique because of the Congressional intent previously stated, namely,

that divorced spouses are to be excluded from benefits arising out of the Railroad Retirement Act. A subsequent case involving a military pension is the Michigan case of *Chisnell v. Chisnell*, 78-1303. It would appear to support the unique and limiting effect of the *Hisquierdo* case wherein this Court, United States Supreme Court, allowed the Michigan court's division of a United States military pension to remain undisturbed. See also, *MMM v. Minnesota*, 78-820.

The final argument of petitioner is that the California court does not have jurisdication to order the petitioner not to honor an election by former husband that would lessen the divorced spouse's pension rights in her former husband's pension in which the petitioner is trustee. "The effect of an election by the employee spouse is to convert his pension benefits to those available under the joint and survivor annuity provisons of the Plan would be to reduce the monthly income payable during the Participant's life and increase the benefits payable after his death. Because the divorced wife's right to share in pension benefits terminates with the death of the husband of the husband, the monetary value of her interest in the pension benefits would be reduced by such an election. It was obviously this result which the trial court attempted to avert by its order prohibiting the husband from selecting the joint and survivor annuity provisions." The above quoted provision is part of the opinion of the Court of Appeal of the State of California, Second Appellate District on page 13, second paragraph and is the reason for the necessity for such a court order.

The idea that one has a right and then has less than such a right by a former husband's election would seem to be repugnant by any legal standard.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Dated: April ...., 1980.

Respectfully submitted,

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